

MINUTES OF THE OPEN SESSION OF THE RHODE ISLAND ETHICS COMMISSION

May 15, 2007

The Rhode Island Ethics Commission held its 9th meeting of 2007 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, May 15, 2007, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

**James Lynch, Sr., Chair James V. Murray
Barbara R. Binder, Vice Chair Ross Cheit
George E. Weavill, Jr., Secretary James C. Segovis
Richard E. Kirby* Frederick K. Butler****

Also present were Kathleen Managhan, Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason M. Gramitt and Dianne L. Leyden; and Commission Investigators Steven T. Cross, Peter J. Mancini and Michael S. Douglas.

At approximately 9:12 a.m., the Chair opened the meeting. The first order of business was to approve the minutes of the Open Session

held on May 1, 2007. Upon motion made by Commissioner Binder and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To approve the minutes of the Open Session held on May 1, 2007.

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Anne McCarver, a member of the City of Newport Trust and Investment Commission. Legal Counsel Managhan indicated that she would recuse from providing advice on the matter given that both she and her office have investments with the petitioner's employer. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was present. In response to Commissioner Binder, the petitioner stated that the city handles its own buying and selling and does not do so through her employer. *Commissioner Kirby arrived at 9:18 a.m.

VOTED: To issue an advisory opinion, attached hereto, to Anne McCarver, a member of the City of Newport Trust and Investment Commission.

ABSTENTION: Richard E. Kirby.

RECUSAL: Kathleen Managhan.

The next advisory opinion was that of Joseph Cardello III, PE, a member of the North Smithfield Planning Board. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was present. **Commissioner Butler arrived at 9:20 a.m. Commissioner Weavill inquired if the petitioner's employer ever appears before the Planning Board. The petitioner replied that it has not since he has been on the Board, but he would recuse if the situation occurred. Commissioner Kirby disclosed that although he has had petitions before the Planning Board in the past, he does not have any matters pending at this time. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Weavill, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Joseph Cardello III, PE, a member of the North Smithfield Planning Board.

ABSTENTION: Frederick K. Butler.

The next advisory opinion was that of Mary Ellen McQueeney-Lally, an attorney employed in the legal division of the Rhode Island Department of Labor & Training. Senior Staff Attorney D'Arezzo presented the Commission Staff recommendation. The petitioner was not present. In response to Commissioner Weavill, Senior Staff

Attorney D'Arezzo stated that the petitioner represented that she and the other attorney do not supervise each other. Commissioners Weavill and Segovis questioned whether there could be tradeoffs between the positions and Senior Staff Attorney D'Arezzo stated that no such information was presented. In response to Commissioner Weavill, she noted that the situation would need to be revisited if either attorney became the other's supervisor. Upon motion made by Commissioner Binder and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Mary Ellen McQueeney-Lally, an attorney employed in the legal division of the Rhode Island Department of Labor & Training.

ABSTENTION: James V. Murray.

At approximately 9:25 a.m. the Commission took a brief recess and reconvened at 9:38 a.m.

The next order of business was that of Motion Hearings in the matter of In re: Joseph A. Montalbano, Complaint Nos. 2006-4 & 2006-11. A stenographer was present to transcribe the hearings and the transcripts are available for review at the Commission Offices.

The first motion to be heard was the Prosecution's Motion to Consolidate Complaint Nos. 2006-4 & 2006-11. Commission

Prosecutor Leyden briefly addressed the Commission and Respondent's Counsel, Max Wistow, stated that he had no objection. Upon motion made by Commissioner Weavill and duly seconded by Commissioner Segovis, it was unanimously

VOTED: To grant the Prosecution's Motion to Consolidate In re: Joseph A. Montalbano, Complaint Nos. 2006-4 & 2006-11.

The next motion to be heard was the Prosecution's Motion to Sequester Witnesses. Prosecutor Leyden addressed the Commission regarding Rule 615 of the R.I. Rules of Evidence and requested that Investigator Michael S. Douglas be allowed to sit with the Prosecutor during the adjudication. Attorney Wistow requested clarification as to whether the Respondent would be afforded the same consideration. Prosecutor Leyden noted that the Rule allows for both parties to have essential witnesses be present upon an offer of proof. In response to Attorney Wistow, Chair Lynch clarified that the Respondent would not be denied the opportunity to sit with counsel. Attorney Wistow argued that all the Rules of Evidence should apply, not just Rule 615, and noted that the case has the aspect of a criminal proceeding.

In response to Commissioner Kirby, Prosecutor Leyden stated that she complied with the Respondent's discovery request regarding identification of witnesses and that she requested a similar list from Attorney Wistow. Attorney Wistow clarified that the request was for a

list of persons with knowledge of information relating to the matter, not necessarily who would be called as witnesses. He indicated it would be helpful to know how long the prosecution intends to take on June 5th and 6th. In response to Commissioner Cheit, Attorney Wistow stated that he does not object to Investigator Douglas being present during the adjudication and reserves his right to make a similar motion if he decides a witness is essential to the Respondent's presentation. Prosecutor Leyden clarified that the Respondent would have to make an offer of proof as to that witness. Legal Counsel Managhan explained that the Commission is considering the Prosecution's motion and the Respondent reserves his right to raise his own motion in the future, which the Commission may decide to act on in its discretion. Upon motion made by Commissioner Murray and duly seconded by Commissioner Segovis, it was unanimously

VOTED: To grant the Prosecution's Motion to Sequester Witnesses.

The next matter to be considered was the Respondent's Demand for Jury Trial. Attorney Wistow stated that he has filed a demand, not a motion, and in said demand alluded to motions to be filed in the future. He noted that the Prosecutor filed her objection and set the matter down for hearing today, but he argued that Regulation 1012 requires at least five days notice prior to hearing. Attorney Wistow indicated that William Irons filed his demand on April 13th and was afforded a briefing schedule. He argued that he received the formal

Notice of Adjudication on May 8th and filed his demand within two days. He noted that Mr. Irons' attorney, John Tarantino, filed his brief in support of his demand yesterday. Attorney Wistow argued that the Commission's decision regarding the jury trial issue would bind his client and arguably Mr. Irons. He stated his belief that Attorney Tarantino should be allowed to speak because the issues are intertwined and also objected to inadequate notice of the hearing today on the Objection to Respondent's Demand for Jury Trial.

Chair Lynch noted that Mr. Irons is not before the Commission at this time. Commissioner Kirby expressed that the Prosecutor had set down today as a motion day regarding the motions to consolidate and sequester and, after receiving the demand, apparently filed an objection out of an abundance of caution. Attorney Wistow acknowledged that he had not spoken with the Prosecutor as to the timeliness issue and stated that he is entitled to rely on the regulations. Prosecutor Leyden represented that she sent Attorney Wistow a letter on February 26th indicating that the adjudication was scheduled for June 5th and 6th and if that if he anticipated filing motions prior to the hearing, he should do so in accordance with Regulation 1012. She advised that he filed his demand on May 10th, less than three weeks prior to the adjudication. She argued that this was a delay tactic and objected to his demand. She stated that Regulation 1014 requires the Respondent to be given at least fifteen days notice of adjudication, but the Prosecution gave him months. She requested that his demand be heard today rather than delay the

adjudication.

Legal Counsel Managhan asked for clarification regarding the reference in the demand to pre-hearing motions the Respondent would be filing. Attorney Wistow replied that he intends to file substantive motions to dismiss for reasons he would not be disclosing at this time, but that do not related to the jury trial issue. He stated that he is not suggesting that the adjudication date is a surprise to him but that he received formal notification on May 7th. He indicated that Mr. Irons filed his demand after an adjudication had been scheduled.

Commissioner Cheit requested clarification as to whether the Respondent's demand is a motion, indicating that five days notice would not be needed if it were not a motion. Attorney Wistow stated that the Prosecutor filed her objection and noticed it for hearing on May 15th. In response to Chair Lynch, Legal Counsel Managhan advised that there is nothing on the agenda regarding Mr. Irons' matter and his attorney would not have any posture to address the Commission. She suggested that to do so would run afoul of the Open Meetings Act. Commissioner Segovis concurred that the other matter should be kept separate. Chair Lynch asked if anyone had an objection to not hearing from Attorney Tarantino. Attorney Wistow suggested that Mr. Irons' rights would be affected because he agreed to a briefing scheduled which would become moot.

In response to Commissioner Cheit, he stated that Attorney Tarantino

asked him to speak on behalf of his client's interests. He objected to going forward due to inadequate notice, but also stated that he is prepared to argue if the Commission requires it.

Legal Counsel Managhan asked why the Respondent had not raised his motion in a more timely fashion. Attorney Wistow replied that he has other serious constitutional issues to raise and has the right to file them not less than five days prior to hearing. Commissioner Kirby asked how the Commission would hear his demand if it were not somehow placed before them. Attorney Wistow stated his belief that he could come in the morning of the adjudication and ask for a jury trial. He noted that the Commission had agreed to a briefing schedule for Mr. Irons. Upon motion made by Commissioner Weavill and duly seconded by Commissioner Segovis to move ahead on the Respondent's Demand for Jury Trial, there was discussion.

Commissioner Binder suggested that perhaps the objection to the demand is really not a motion, but the nomenclature used may not be important. Legal Counsel Managhan expressed that it was not clear to her whether as of June 5th the demand, along with Respondent's other motions, would turn into a motion, which would support hearing the matter now. Attorney Wistow replied that he does not intend to file a motion for a jury trial unless something strange happens today. He stated his intent to file motions on other constitutional bases which, if denied, he would press in court, including the jury trial issue. Commissioner Segovis asked for

clarification why the Respondent utilized a demand rather than a motion. Attorney Wistow replied that a motion suggests the opportunity exists to object or argue, whereas a demand relates to an established right. Commissioner Kirby noted that a demand is not discretionary.

Legal Counsel Managhan indicated that in superior court civil matters there is no motion, but a demand for jury trial is made at the end of a complaint. She suggested that if there were any issue as to whether there would be a jury trial, it would be taken up beforehand. Attorney Wistow disagreed with Legal Counsel's characterization of the superior court civil process and stated that the opposition may move to strike. He reiterated that he does not intend to file a jury trial motion.

Commissioner Cheit asked to hear more on the question of whether the Respondent raised the issue in a timely fashion. Prosecutor Leyden argued that it is not timely, but only a delay tactic. She reiterated that she notified Attorney Wistow in February of the June adjudication date and that three weeks prior to that date he raised Attorney Tarantino's novel idea of a jury trial. In response to Commissioner Kirby's question of whether the trial date should be changed, she stated that there is a lot of preparation involved for an adjudication and she heard nothing from the Respondent until May 10th.

Commissioner Murray questioned whether the issue is properly before the Commission. He indicated his expectation of seeing a motion to strike the demand and briefs on the issue. Commissioner Cheit inquired if a briefing schedule could be established without delaying the trial. Legal Counsel Managhan indicated that there would not be another Commission meeting in the interim. Prosecutor Leyden noted that she scheduled the pre-trial motions for May 15th for that very reason.

Commissioner Segovis indicated his disappointment that the issue was being raised at this time and in this fashion given that there had been more than enough time to raise it. He withdrew his second to the motion. He expressed that the Respondent's issue should remain separate from Mr. Iron's. Commissioner Cheit stated that he would be open to deciding that the issue was not timely raised. Commissioner Weavill withdrew his original motion, but voiced his concerns that briefs are being filed in another matter regarding the same issue.

In response to Commissioner Weavill, Prosecutor Leyden stated that both Attorney Wistow and Attorney Tarantino have raised the jury trial issue. She distinguished the Irons case in that the demand was filed prior to the actual hearing date being noticed. In response to Commissioner Cheit, Prosecutor Leyden indicated her belief that the matter is not properly before the Commission because the demand is based on constitutional issues that only the courts can decide.

Commissioner Cheit stated that the issue does not get to the courts unless the Commission does something. Prosecutor Leyden replied that is why she put the matter down for hearing. She advised that subpoenas have issued and the Prosecution is ready for trial.

In response to Chair Lynch, Legal Counsel Managhan stated that she would like the benefit of arguments from both parties as to the constitutional issue. She expressed that the Commission as an administrative agency does not have the jurisdiction to determine issues of claims to rights under Article 1, sections 10 and 15. She stated her belief that the Commission could rule on a motion for a jury trial, if one were filed, but not as to Article 1, sections 10 and 15. She indicated that the Commission may only look at its own constitutional and statutory mandates. She suggested that Attorney Wistow would proceed at his peril on June 5th if he believes he could stop the proceeding with a motion. Commissioner Binder asked if the Commission has the ability to issue an order regarding a briefing schedule on the demand. Legal Counsel Managhan advised the members to respond pursuant to the motions before it. Attorney Wistow stated that upon hearing Legal Counsel's comments he would be forced to file a motion at least five days prior to hearing.

Legal Counsel Managhan indicated that it is difficult for her to render advice as to the demand issue since there are no rules for it in the Code. In response to Commissioner Cheit, she indicated that Regulation 1012 governs pre-hearing motions and Attorney Wistow

stated that his demand is not a motion. Prosecutor Leyden advised that the demand came with Respondent's response to her motions to consolidate and sequester. Upon motion made by Commissioner Segovis and duly seconded by Commissioner Weavill, it was unanimously

VOTED: To proceed with the adjudication scheduled for June 5th and 6th.

At approximately 11:03 a.m., upon motion made and duly seconded, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(4), to wit:

a.) Motion to approve minutes of Executive Session held on May 1, 2007.

b.) Motion to return to Open Session.

The Commission reconvened in Open Session at approximately 11:19 a.m. The Chair reported that the Commission approved minutes of the Executive Session held on May 1, 2007.

The next order of business was the Director's Report. Executive

Director Willever reported that there are six Complaints and sixteen advisory opinion requests pending. He noted that the Commission received one APRA request since the last meeting, which was not denied. He advised that he has submitted the paperwork to fill the Staff Attorney I position, which is key to responding to advisory opinions, but it has not been approved yet.

The next order of business was New Business. Chair Lynch asked the members whether they wished to have Legal Counsel present at the regulatory workshop sessions. The consensus was that Legal Counsel need not attend and may weigh in on the proposals when they are noticed for public hearing. At approximately 11:22 a.m, upon motion made by Commissioner Cheit and duly seconded by Commissioner Weavill, it was unanimously

VOTED: To adjourn the meeting.

Respectfully submitted,

George E. Weavill, Jr.
Secretary